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Supreme Court, U.S.
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No. 09-154

In the Supreme Court of the United States

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., a Florida Not for Profit Corporation; GUY M. SPEARMAN, III, a Natural Person; SPEARMAN MANAGEMENT COMPANY, a Florida Corporation; RONALD L. BOOK, a Natural Person; RONALD L. BOOK, P.A., a Florida Professional Association,

Petitioners,

v.

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, a Florida State Agency; THE FLORIDA COMMISSION ON ETHICS, an Independent Constitutional Commission; JEFF ATWATER, as President of the Florida Senate; and LARRY CRETFUL, as Speaker of the Florida House of Representatives,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state law that requires disclosure of the identities of those paying for grassroots lobbying – "opinion articles, issue advertisements, and letter writing campaigns" – facially violates the First and Fourteenth Amendments due to vagueness and overbreadth.

2. Whether a state law that prohibits all gifts for the purpose of lobbying facially violates the First and Fourteenth Amendments due to vagueness and overbreadth.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. The respondents are all government entities or office holders.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW viii

JURISDICTION ix

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ix

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. Certiorari is Not Warranted Because the Decision in *Citizens United v. FEC* Will Not Affect This Case 5

A. Petitioners misread *United States v. Harriss*, the decision of the Eleventh Circuit, and the Act 5

B. Petitioners did not challenge the "gift ban" as overbroad in the lower courts. 10

II. Certiorari is Not Warranted Because the Decision of the Eleventh Circuit Does Not Conflict with Any Decision of This Court, the Federal Courts of Appeal, or a State Supreme Court. 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Austin v. Mich. Chamber of Commerce,
494 U.S. 652 (1990) 8

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 4

Buckley v. Valeo,
414 U.S. 1 (1976) 9

Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.,
525 F.3d 1073 (11th Cir. 2008) 1, 3

Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.,
566 F.3d 1281 (11th Cir. 2009) 1

Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.,
7 So. 3d 511 (Fla. 2008) 1

Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.,
431 F. Supp. 2d 1228 (N.D. Fla. 2006) 4, 5

McConnell v. Federal Elections Commission,
540 U.S. 93 (2003) 5, 6, 8, 9

United States v. Harriss,
347 U.S. 612 (1954) 5, 6, 7, 11

United States v. Williams,
504 U.S. 36 (1992) 10, 12

Virginia v. Hicks,
539 U.S. 113 (2003) 8

Federal Statutes

2 U.S.C. § 261-270 6

2 U.S.C. § 441b 6

Florida Statutes

Fla. Stat. § 11.045 1

Fla. Stat. § 11.045(1)(b) 3

Fla. Stat. § 11.045(1)(d) 2

Fla. Stat. § 11.045(1)(f) 2

Fla. Stat. § 11.045(1)(g) & (h) 2

Fla. Stat. § 11.045(1)(i) 3

Fla. Stat. § 11.045(3)(a) 2, 3

Fla. Stat. § 11.045(4)(a) 2

Fla. Stat. § 11.045(5) 4, 8

Fla. Stat. § 112.3215 1

Fla. Stat. § 112.3215(1)(c) 3

Fla. Stat. § 112.3215(1)(d), (f) & (6)(a) 2

Fla. Stat. § 112.3215(1)(i) 3

Fla. Stat. § 112.3215(5)(a)..... 2, 3

Fla. Stat. § 112.3215(11)..... 4, 8

OPINIONS BELOW

Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, 566 F. 3d 1281 (11th Cir. 2009) (final judgment affirming summary judgment for defendants). (Pet. App. 1)

Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, 525 F. 3d 1073 (11th Cir. Apr. 23, 2008) (affirmed in part and question certified). (Pet. App. 3)

Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, No. SC08-791, 7 So. 3d 511 (Fla. 2008) (certified questions answered). (Pet. App. 19)

Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, No. 4:06cv123-SPM/WCS 2006 WL 3826985 (N.D. Fla. Dec. 28, 2006) (final summary judgment). (Pet. App. 33)

Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, 431 F. Supp. 2d 1228 (N.D. Fla. 2006) (preliminary injunction denial). (Pet. App. 46)

JURISDICTION

This court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions at issue are reproduced in the appendix to the petition for writ of certiorari.

STATEMENT OF THE CASE

In 2005 the Florida Legislature enacted chapter 2005-359, Laws of Florida (the "Act"), to further regulate the practice of paid lobbying before the legislative and executive branches of state government. Petitioners, without waiting to see how the Act might be applied to the various activities they claim they are involved in, *see* Petition at 6-7, immediately filed suit asserting the Act was *facially* invalid under the state and federal constitutions. Here, they attack certain provisions of the Act codified at sections 11.045 and 112.3215, Florida Statutes, which the Eleventh Circuit found neither unconstitutionally vague nor overbroad under the First and Fourteenth Amendments.[1]

Each statute generally bans payments to legislators, executive branch officials and their staffs, requires lobbying firms to prepare and file quarterly compensation reports disclosing compensation they receive from clients or principals, and provides for sanctions against lobbying firms that fail to follow the Act.

With respect to the legislative branch the Act specifically provides that:

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[1] *Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 525 F.3d 1073 (11th Cir. 2008). The Eleventh Circuit certified three state-law questions to the Florida Supreme Court, which ruled that the Act did not violate the Florida Constitution. *Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 7 So. 3d 511 (Fla. 2009). The Eleventh Circuit then affirmed the district court's judgment. *Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 566 F.3d 1281 (11th Cir. 2009).

> [N]o lobbyist or principal shall make, directly or indirectly, and no member or employee of the Legislature shall knowingly accept, directly or indirectly, any expenditure, except floral arrangements or other celebratory items given to legislators and displayed in chambers the opening day of a regular session.

Fla. Stat. § 11.045(4)(a). An "expenditure" is a "payment" or "anything of value" "made by a lobbyist or principal for the purpose of lobbying. Fla. Stat. § 11.045(1)(d). "Lobbying" is defined as "influencing or attempting to influence legislative action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature." Fla. Stat. § 11.045(1)(f). "Lobbyists" and "lobbying firms" are those persons or business entities who are paid to lobby. Fla. Stat. § 11.045(1)(g) & (h). The definitions and prohibitions are essentially the same for the executive branch. *See* Fla. Stat. § 112.3215(1)(d), (f) & (6)(a).

The Act further requires that lobbying firms file quarterly reports designating the total compensation paid or owed to the firm resulting from "lobbying activity" in broad, monetarily-defined categories. *See* Fla. Stat. §§ 11.045(3)(a)1.c. & 112.3215(5)(a)1.c. ("$0; $1 to $49,999; $50,000 to $99,999; $100,000 to $249,999; $250,000 to $499,999; $500,000 to $999,999; $1 million or more.").

Lobbying firms must also report total compensation provided or owed by each "principal" or the "person, firm, corporation or other entity which has employed or retained a lobbyist," in similar broad

categories. Fla. Stat. §§ 11.045(1)(i), 112.3215(1)(i), 11.045(3)(a)2.b. and 112.3215(5)(a)2.b. ("$0; $1 to $9,999; $10,000 to $19,999; $20,000 to $29,999; $30,000 to $39,999; $40,000 to $49,999; or $50,000 or more."). For any principal providing or owing $50,000 or more, the firm must report the dollar amount of compensation received from the principal "rounded up or down to the nearest $1,000." *Id.*

Petitioners contended that the prohibition on the making or acceptance of an expenditure "directly or indirectly" was so unclear that a person of common intelligence could only guess at its meaning. The Eleventh Circuit rejected this vagueness challenge out of hand, pointing out that the Act "only bars those lobbying expenditures accepted by a governmental official." *Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 525 F.3d 1073, 1078-79 (11th Cir. 2009). The term "indirect" was not vague. "[A] person of common intelligence would understand that it applies to expenditures or compensation paid through a third party." *Id.*

The Eleventh Circuit interpreted petitioners' overbreadth argument as a challenge to "disclosure of compensation paid to a lobbyist even where that compensation has not been paid for expressly advocating passage or defeat of legislation." *Id.* But the court rejected this claim as misconstruing the Act. *Id.* "Contrary to their claim that the Act requires the disclosure of all compensation paid to lobbyists regardless of how the funds are used, the Act actually only requires the reporting of compensation that lobbyists 'receive for any lobbying activity.' Fla. Stat. §§ 11.045(1)(b), 112.3215(1)(c)."

The Eleventh Circuit then took note of petitioners' contention that the definition of lobbying encompassed not only direct communication "but also indirect communications—such as opinion articles, issue advertisements, and letter writing campaigns—from lobbyists on behalf of their clients *to the press and public at large for the purpose of influencing legislation or policy*." *Id.* at 1080 (emphasis added).[2]

The court rejected this argument as a basis for invalidation of the Act. Holding that a state has a compelling interest in "self-protection in the face of coordinated pressure campaigns by lobbyists," and that these interests are compelling whether they are "direct" or "indirect," it could not find that the Act "on its face [was] substantially overbroad." *Id.* Accordingly, it left "whatever overbreadth may exist [to] be cured through case-by-case analysis of the fact situations to which [the Act's] sanctions, assertedly, may not be applied." *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615-616 (1973)).

The Act provides a mechanism by which any persons "in doubt about the applicability and interpretation of [the Act] in a particular context" may obtain an advisory opinion. Fla. Stat. §§ 11.045(5) and 112.3215(11). The district court noted that these provisions "weigh[ed] against any finding of vagueness" and that petitioners were free to "seek an advisory opinion regarding the Act's applicability to differing factual scenarios." *Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info.*

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[2] The first of the questions presented does not accurately quote this statement. The omission of half the statement results in a question not presented or passed upon in the proceedings below.

Servs., 431 F. Supp. 2d 1228, 1235 & 1237 (N.D. Fla. 2006).

REASONS FOR DENYING THE WRIT

Petitioners argue that this Court's forthcoming decision in *Citizens United v. FEC*, No. 08-205, to the extent it may overrule *McConnell v. Federal Elections Commission*, 540 U.S. 93 (2003), could undermine the Act's disclosure requirements as applied to "indirect" lobbying and the Act's ban on gifts. They also contend the Eleventh Circuit's decision conflicts with decisions of this Court, federal courts of appeals, and state supreme courts. The petition does not support such claims and should therefore be denied.

Further, neither of the questions presented was addressed in the Eleventh Circuit. The first question does not fully quote the Eleventh Circuit's language, and is thereby misleading. Petitioners argued only the vagueness of the Act as it applied to gifts, not its overbreadth and not the right of the state to prohibit gifts. The arguments now presented in the Petition were not pressed or passed upon below, and therefore do not warrant a grant of certiorari.

I. Certiorari is Not Warranted Because the Decision in *Citizens United v. FEC* Will Not Affect This Case.

A. Petitioners misread *United States v. Harriss*, the decision of the Eleventh Circuit, and the Act.

Petitioners assert that the decision in *United States v. Harriss*, 347 U.S. 612 (1954), did not address disclosure requirements as applied to "indirect"

lobbying and therefore lower courts considering "grass roots lobbying" have relied on *McConnell*. Pet. at 15-16. The *McConnell* decision upheld the facial validity of section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b, distinguishing between express advocacy and issue advocacy in federal election campaigns. *McConnell* is relevant, petitioners contend, because the *Harriss* Court construed the federal act regulating lobbying "as applicable *solely* to direct, face-to-face lobbying of Congress and to direct letter writing to Congress." Pet. at 14 (emphasis added). Petitioners have misread *Harriss*.

Harriss involved a criminal prosecution and the issue was whether the federal lobbying act could withstand a vagueness challenge. The question this Court addressed was who were the persons to whom the act could constitutionally apply. Unlike the Florida law, § 307 of the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270, was not by its terms limited to professional lobbyists—that is, only those persons hired and paid to influence legislation. Section 307 and the reporting requirements of § 305 applied to "any person" who might collect or receive money that would even "indirectly" aid in or influence the passage of legislation. As written, the criminal sanctions of the federal act applied equally to those who were not hired lobbyists but who merely sought to exercise their First Amendment rights to engage in or stimulate public debate. Hence, the *Harriss* decision limited the application of the federal act to persons engaged in "lobbying in its commonly accepted sense"—that is, "to direct communication with members of Congress on pending or proposed federal legislation." 347 U.S. at 620.

The Court in *Harriss* went on to say:

> The legislative history of the Act makes clear that, *at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign.* It is likewise clear that Congress would have intended the Act to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible.

Id. at 620-621 (emphasis added) (footnotes omitted). It is obvious that *Harriss* intended only to foreclose application of the federal act to individuals or organizations who sought only to influence public opinion. *Harriss* did not hold, or even suggest, that a reporting requirement applicable to lobbyists who, on behalf of their principals, take action intended to influence Congress through orchestrated letter campaigns or other circuitous means would violate the First Amendment. To the contrary, *Harriss* expressly recognized Congress' power to inform itself about such calculated activities.

Petitioners also misread the decision below in claiming that the Eleventh Circuit agreed that the Florida Act encompassed not only direct communication "but also indirect communications—such as opinion articles, issue advertisements, and letter writing campaigns—from lobbyists on behalf of their clients to the press and public at large for the purpose of influencing legislation or policy." Pet. at 11-12. The Eleventh Circuit only acknowledged this

to be petitioners' argument. 525 F.3d at 1080. (As noted, the first question presented does not accurately reflect the quoted language.) While recognizing the authority of the legislature to evaluate indirect pressures, the Eleventh Circuit plainly stated that any overbreadth would have to be addressed on a case-by-case basis. *Id.*

Petitioners' facial challenge was not based on any evidence showing how the Act had been applied to any of their "indirect" lobbying activities. Moreover, the definition of "lobbying" in the Act does not embrace pure issue advocacy, assuming that is even conducted by lobbyists. Petitioners' overbreadth claim lacks any context whatsoever, and therefore the decision of the Eleventh Circuit is indisputably correct. As that court pointed out, petitioners' burden under the First Amendment is to show that the Florida Act punishes a substantial amount of protected free speech. *Id.* at 1079. Its application to protected speech must be substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 120 (2003). Petitioners did not make that showing. [3]

The petition fails to show how overruling either *McConnell* or *Austin*[4] would compel any modification to, much less reversal of, the decision below insofar as

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[3] Respondents note that petitioners describe in general terms a number of activities they undertake as lobbyists. Pet. at 7. If petitioners have any doubts about whether the Act applies to these or other activities, they may seek an advisory opinion as provided for by law. *See* Fla. Stat. §§ 11.045(5) & 112.3215(11).

[4] *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

it could be said to address "indirect" lobbying. Even if this Court should find in *Citizens United* that a distinction between express and issue advocacy has proved unworkable in campaign regulation, it will have done so on the basis of substantial experience. However, the claim here, being wholly without context, hardly rises to the level of speculation. Petitioners feign confusion over the Act's application to "indirect lobbying" without ever having presented to the lower courts a single concrete example, much less a substantial number, of lobbying activities to which the Act has been unconstitutionally applied. And they have never contended that the First Amendment shields lobbyists from disclosing the identity of those who fund efforts to influence legislative action.

Further, *McConnell* notes that the distinction between express advocacy and "so-called issue advocacy" is not constitutionally compelled. 540 U.S. at 204-205. The express advocacy test announced in *Buckley v. Valeo*, 414 U.S. 1, 78-81 (1976), was the result of the need to narrowly construe the phrase "for the purpose of . . . influencing" a federal election. *Id.* at 191-192. What that terminology might mean was entirely open-ended. Hence, the Court construed it to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 191.

In contrast, Florida defines "lobbying" to mean "influencing or attempting to influence legislative action or nonaction through oral or written communication . . . ." That is neither vague nor overbroad. It means action taken by a lobbyist that is calculated to induce the legislature to act in a particular way. Unless this Court effectively holds in

Citizens United that the legislature and the public have no right to know who pays lobbyists to influence legislation, its decision will have no bearing on the issues in this case.

B. Petitioners did not challenge the "gift ban" as overbroad in the lower court.

Petitioners suggest for the first time in these proceedings that gifts to legislators are a form of speech or an aid to speech and therefore cannot be restricted or prohibited under the First Amendment. This is not the argument presented to or decided by the Eleventh Circuit. Because the question was not "pressed or passed upon" below, a grant of certiorari is not warranted. *See United States v. Williams*, 504 U.S. 36, 41 (1992).

As is clear from the Eleventh Circuit's opinion, petitioners' argument was over the *proper construction* of the statutes prohibiting the giving and accepting of payments to legislators. 525 F.3d at 1078-79. The court construed the Act and held that an "expenditure" (*i.e.*, payment) is unlawful only if made by a lobbyist or principle *and* accepted by a government official. It found the term "indirect" was not vague. "[A] person of common intelligence would understand that it applies to expenditures or compensation paid through a third part." *Id.* at 1079. The petition does not take issue with this construction.

II. Certiorari is Not Warranted Because the Decision of the Eleventh Circuit Does Not Conflict with Any Decision of This Court, the Federal Courts of Appeal, or a State Supreme Court.

The apparent premise of petitioners' argument is that the Act applies to pure issue advocacy by lobbyists. Clearly it does not, and petitioners never adduced any evidence to support the contention that the Act has been so applied. On its face, the definition of "lobbying" does not embrace pure issue advocacy, those who, in *Harriss*' terms, seek to "propagandize the general public." 347 U.S. at 621. Moreover, as *Harriss* made clear, direct pressures on the legislature include those "exerted by the lobbyist themselves or through their hirelings or through an artificially stimulated letter campaign." *Id.* at 620. The petition does not question the right of the legislature and public to know who is behind such pressures.

The relevant holding of the Eleventh Circuit is that the bald assertion that the Act applies to "opinion articles, issue advertisements and letter-writing campaign[ ] from lobbyists on behalf of their clients to the press and public at large for the purpose of influencing legislation or policy" did not in itself suffice to establish substantial overbreadth. 525 F. 3d at 1080. The Eleventh Circuit's decision leaves open both as-applied challenges to the Act and ultimately, depending on what can be proved, a facial challenge. At this point, petitioners have not shown the Act applies to any advocacy not aimed at the legislature and intended to influence its action. Accordingly, the decision of the Eleventh Circuit does not conflict with any of the cases cited by petitioners.

Petitioners also assert that the gift ban conflicts with decisions striking laws that limit campaign contributions. This issue was not "pressed or passed upon" in the lower court proceedings, and accordingly is not properly presented here. *Williams*, 504 U.S. at 41.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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